Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1382

STANLEY SWITLIK and RICHARD SWITLIK,
Petitioners,

—*v.*—

THE HARDWICKE CORPORATION; HARDWICKE COMPANIES INCORPORATED; GREAT ADVENTURE, INC.; ACKERMAN-NEY ASSOCIATES; WARNER LEROY and HARDWICKE'S NEW JERSEY PRESERVES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITIONERS' REPLY MEMORANDUM

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TABLE OF CONTENTS

	PAGE
PETITIONERS' REPLY MEMORANDUM	1-5
APPENDIX A—Letter Memorandum Filed with the New Jersey Supreme Court	1a

United States Constitution Cited

First Amendment	2-4

Rules Cited

Rule 2:12-7(a)	3
Rule 2:12-7(b)	3

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The brief submitted in opposition to the petition for certiorari raises a number of issues not addressed in the petition, only one of which, however, warrants a reply. In the footnote appearing at page 12 of the respondent's brief, an apparent effort is made to dis-

suade this Court from granting the petition, the text of the footnote reading as follows:

> This so-called "free-speech" argument which Richard Switlik is now emphasizing played a minimal role in the appeal of this case up to the time of the petition (Petition, pp. 9-14). It consumed seven pages of the Switliks' 124 page brief to the Appellate Division of the Superior Court and was not even raised in their petition for certification to the Supreme Court of New Jersey or in their motion to that Court for reconsideration of its denial of certification [Rb12n*].

To begin, it is implicitly conceded by respondent that the First Amendment issue *was indeed raised* in the Superior Court of New Jersey, Appellate Division. Instead of acknowledging that petitioners have complied with the preconditions of raising federal constitutional issues in this Court—and moving on to discuss the substance of these issues—respondent makes the altogether irrelevant observation that the First Amendment issue "consumed seven pages of the [petitioners'] 124 page brief to the Appellate Division of the Superior Court . . .," an observation designed to suggest that this issue not now be considered. Apart from the invalidity of respondent's arithmetical comparison,[1] there is no quantitative requirement with respect to raising issues below

[1] Petitioners' brief to the Appellate Division, although a total of 124 pages, contained only 60 or so pages of legal argument, the balance comprised of a Procedural History and a Statement of Facts. Thus, the seven pages of legal argument devoted to the First Amendment issue, when compared to the total number of pages devoted to all legal argument, takes on a significance far greater than respondent would have this Court believe.

that compels a litigant to devote a certain number of pages of discussion to a federal constitutional issue, lest he waive his right to renew that argument in this Court.

With regard to respondent's assertion that the First Amendment issue was not raised in either the petition for certification to the Supreme Court of New Jersey or the motion for reconsideration of the denial thereof, the following should be noted. Rule 2:12-7(a) of the New Jersey Rules of Court provides, *inter alia,* that a petition for certification "* * * shall be in the form of a brief * * * not exceeding 15 pages if printed or 20 pages if otherwise reproduced or typed, exclusive of table of contents, citations and appendix * * *." In view of the page limitation regarding petitions for certification to the New Jersey Supreme Court, it is clear that the petition itself cannot explicitly put before the Court all the issues raised below, particularly in cases such as the one herein where countless issues have been raised in the Appellate Division. In order to alleviate this difficulty, Rule 2:12-7(b) provides that, within 10 days after filing the Notice of Petition for Certification, 9 copies of petitioner's Appellate Division brief and appendix shall be filed with the Clerk of the Supreme Court. Thus, once petitioners filed the required copies of their Appellate Division brief with the New Jersey Supreme Court, the First Amendment issue raised herein was squarely before it.

Finally, it should be pointed out that, after petitioners filed their Motion for Reconsideration in the New Jersey Supreme Court, and after respondent replied thereto, petitioners filed a letter memorandum with the New Jersey Supreme Court (attached hereto as Appendix "A"), before the Motion was decided, wherein they explicitly stated:

> Hardwicke's claim that acts unrelated to the contract of sale involving Richard also constituted interference is plainly frivolous, and an obvious effort to distract this Court from the legal error committed by the courts below regarding the privilege of an agent. Each one of the alleged acts to which Hardwicke refers (Rb Rp. 10*) would have been within the general scope of Richard's agency, an agency which Hardwicke has repeatedly recognized. Moreover, many of these acts, *independent of the question of agency,* are fully protected by the First and Fourteenth Amendments to the United States Constitution [Petitioners' letter to the New Jersey Supreme Court, dated November 29, 1979; emphasis in the original].

In view of the foregoing, it is somewhat disingenuous of respondent to suggest that the New Jersey Supreme Court was unaware of petitioners' First Amendment argument.

Except for respondent's suggestion that petitioners did not properly raise the federal constitutional issues below —a suggestion which for the reasons stated heretofore has no merit—respondent has not even attempted to deal with the substantive considerations raised in petitioners' application. Indeed, respondent has all but ignored the decisions of this Court which petitioners discussed in their petition, relying instead on cases interpreting various states' common law in the context of tortious interference with either prospective economic advantage or contract. Precisely the issues which petitioners seek to have this Court review, respondent sidesteps. Perhaps that is because there is no constitutionally sound basis upon which to oppose petitioners' arguments. Under the circumstances, petitioners submit that a writ of certiorari should

issue in this matter to review the judgment and opinion of the Superior Court of New Jersey, Appelalte Division.

Respectfully submitted,

WILLIAM B. MCGUIRE
Counsel for Petitioners, Stanley and Richard Switlik.

April 14, 1980.

[APPENDIX FOLLOWS]

APPENDIX A

Letter Memorandum Filed with the New Jersey Supreme Court

[Letterhead of Lum, Biunno & Tompkins]

November 29, 1979

The Honorable Justices of the
Supreme Court of New Jersey
State House Annex
Trenton, New Jersey 08625

Re: *Stanley Switlik and Wanda Switlik* v. *The Hardwicke Corporation, etc., et al.*: Motion for Reconsideration of Denial of Certification (Petition for Certification Docket No. 16,201; Denial of Certification Docket No. C-119; Motion for Reconsideration Docket No.)

Dear Justices:

We have reviewed the respondents' brief, received by us on November 26, 1979, answering the brief filed by us in petitioners' behalf in support of their motion for reconsideration. This reply is impelled not by respondents' unwarranted hyperbole, nor by the personal attacks in respondents' brief on one of the petitioners, but, rather, because of material omissions and inaccuracies which appear therein.

We shall endeavor to deal, as summarily as possible, both with certain fundamental errors contained in the respondents' answering brief, and their perhaps unwitting admissions of circumstances which support certification.

Appendix A

I.

Petitioners have pointed out that essential elements of the tort of fraud, including alleged causally related damages, were neither proved nor found. Respondents were required to prove, *inter alia,* a material defect in title. Hardwicke now responds that determining the "exact" location of 10C was unnecessary. This response, particularly the calculated use of the word "exact," is obviously designed to create the impression that Hardwicke was aware of a close approximation of the location and size, and *a fortiori* the existence, of Lot 10C. No response could be more disingenuous, as Hardwicke's direct statement to the Appellate Division in its brief on the appeal from the Addison decision makes abundantly clear:

> To this day the *location and existence* of Lot 10C has not been established. It can be done only by a survey of hundreds of acres conveyed by Switlik to the State of New Jersey in 1964. This has never been done (Emphasis supplied; Pet. App. p. 34).*

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* References used herein are:

Pet. App. — Appendix to Petition for Certification.

Sa — Appendix to Switlik Brief in Appellate Division.

Pet. Cert. — Petition for Certification.

PbR — Petitioners' Brief in Support of Reconsideration.

RbR — Respondents' Brief on Reconsideration.

T// — Transcript with appropriate date.

Appendix A

Equally misleading is Hardwicke's most recent assertion that the location of 10C was regarded as significant. This is wholly belied by Hardwicke's representation in its brief on the Addison appeal:

> Hardwicke was prepared to acquire the Switlik property from the Switliks despite the Lot 10C imperfection. There appeared to be adequate room for passage north of Lot 10C (Sa 361).

Beyond its contradictory positions to different appellate tribunals in New Jersey, Hardwicke has also failed to acknowledge its devastating written admissions to the executive branch of New Jersey state government at the time in issue (P442a, 444a) that there was a question whether 10C existed, where it was located and that it was "indeterminate" in size and location, of no more than ½ an acre, and not worth a survey to find, since its value was substantially less than the cost of a survey.

Hardwicke's argument that the fear of ownership of 10C by the Switliks, rather than by the State of New Jersey, is insufficient to obviate the need for finding whether 10C existed. If 10C did not exist, were small, or could not affect the park, who owned it obviously would be unimportant, and no legitimate claim could have been made against Stanley Switlik for failure to transfer it. Location, size, and existence were therefore essential to be proved for any successful claim. On the other hand, if 10C were shown to be important to Hardwicke when located, and were owned by the State of New Jersey, Hardwicke could not assume, as they suggest, that the State would quickly surrender its valuable rights, that the approval of the State House Commission would probably follow in any given time frame, or that Hardwicke could use the state lands in the interim.

Clearly then, despite its most recent efforts to disguise previous assertions of record, Hardwicke has utterly failed to refute petitioners' position that New Jersey precedent regarding fraud requires proof of materiality of fact, falsity, reliance and casually related damages.

On the matter of malicious interference, we believe the Court should read respondents' presentation as acknowledging that Richard Switlik was the negotiating agent for his father. Indeed, in light of the express representations to exactly that effect by Hardwicke in other litigation between the same parties, previously referred to (PbR p. 15 ¶15; Pet. Cert. p. 6), and Judge Addison's finding, Hardwicke could no no less, although its Appellate Division Brief directly denied the agency relationship. What appears to be the basis for respondents' argument is that Richard, as agent for his father, should not be protected if he was acting in his own interest. Apart from that issue having never been resolved by this Court, and itself a basis for granting certification, respondent acknowledges that Stanley Switlik demanded the very clauses which his son had requested. (RbR p. 22). As the Court is aware, that, in and of itself, constitutes proper delegation and ratification, and thus independently makes the acts of Richard, from their commencement, the acts of his prinicpal. That acknowledgement is also a basis for granting certification.

We can understand why an attempt would be made by respondents to distinguish Richard from the interests of his father for the purpose of creating a large claim. But each of the clauses sought in the contract between Hardwicke and Switlik (as previously demanded by Stanley Switlik's attorney on his client (Stanley) instructions (PbR p. 12 ¶5)), now forming the basis for the judgment

against Richard for interference, was a change which benefited the father, a party to the contract, as seller, and not Richard. It would be a significant perversion of the law to claim that such acts would solely serve the benefit of the agent. The obvious intention of this perversion is the avoidance of what we believe is the privilege of an agent against liability for interference. Again, this is a legal question of significant public importance, satisfying one of the criteria enumerated in R. 2:12-4.

Hardwicke's claim that acts unrelated to the contract of sale involving Richard also constituted interference is plainly frivolous, and an obvious effort to distract this Court from the legal error committed by the courts below regarding the privilege of an agent. Each one of the alleged acts to which Hardwicke refers (RbR p. 10*) would have been within the general scope of Richard's agency, an agency which Hardwicke has repeatedly recognized. Moreover, many of these acts, *independent of the question of agency,* are fully protected by the First and Fourteenth Amendments to the United States Constitution.

II.

Without intending to diminish any of the issues raised in Petitioners' brief on reconsideration, and in no way conceding any of the points in respondents' brief not addressed specifically herein, we discretely discuss the following two aspects of respondents' brief.

Appendix A

A.

CAUSATION AS TO FRAUD CLAIM

Petitioners have pointed out to this Court Hardwicke's formal representation to the trial court that, independent of any other reason, the delay in getting title until June 21, 1973 caused the alleged delay in opening the park. In response, in its most recent brief filed with this Court, Hardwicke attempts to disavow this fatal admission by stating that "the Switliks' assertion of title to Lot 10C caused it to hold back development of the entertainment portion of the park, *even including th development of preliminary drawings and floor plans for the site plan application* [Emphasis supplied; RbR at p. 18]."

We call the Court's attention to what must be obvious: The respondents' effort to demonstrate that the alleged fraud, *rather than failure to obtain final site plan approval from the Jackson Township Planning Board,* caused the delay in opening, contradicting its own trial brief, is wholly unaccompanied by citation to the record. This absence of supporting record reference is due, quite simply, to its non-existence.

That Hardwicke did not hold up preparations for site plan approval, at all, is clear from the record. The President of Hardwicke testified that he authorized the obtaining of site plan approval for the theme or entertainment park without regard to 10C (T 1/31/77, p. 39). Mr. Ney, the engineer employed to obtain that approval, testified that his firm was retained in July 1973 to do so (before the 10-C issue arose), and that he needed three months to complete the plans and other submissions which would be required by the Planning Board. Given the date of retention, the filing and completion could not have been accomplished earlier. As Mr. Ney said: "Work proceeded from the day we were first engaged towards a complete site plan application . . . I believe it's the 5th or 6th of November, I submitted the plans to the Township Engineer." (T2/2/77, pp. 19-24). Thereafter, final approval did not occur, after separate litigation finding defects in the submission, until December 26, six days *after* Judge Addison rendered his opinion in the 10C case. Until site plan approval, neither final plans nor construction could have proceeded.

Appendix A

These egregious errors of fact in respondents' submission further demonstrate the prejudice suffered by petitioners, aggravated by the failure of the lower courts to make findings required by the Rules. R. 1:7-4. At this late stage such error cannot be excused.

B.

MALICIOUS INTERFERENCE

Release and Single Controversy

Hardwicke asserts, again unaccompanied by citation to the record, that the release given by it to Stanley and Wanda Switlik could not have simultaneously released Richard from alleged tort liability for interference, and that the single controversy bar, resulting from the dismissal of the specific performance and delay suit, and its settlement on closing, does not apply because Hardwicke was unaware of the interference at the time.

That is, on its face, incredible. Nearly all of the claimed interference made the subject of judgment for

liability and damages related to direct negotiations of clauses *leading to* and predating the closing and settlement. We can only assume confusion in respondents' brief on these issues but, again, that is no excuse, particularly when the facts of record are so clear.

III.

Petitioners' brief in support of reconsideration sets forth numerous grounds for granting certification, each of which fully satisfies the requirements of *R.* 2:12-4. Naturally, we expected respondents to have a different view. What we did not expect—and what we cannot tolerate—is respondents' attempted refutation of petitioners' positions through the use of distortion, deliberate or otherwise. Respondents have chosen not to attack the *validity* of the facts stated by petitioners in their brief on reconsideration. Consequeutly, those facts stand undisputed.

It is not surprising that Hardwicke so fervently wishes to discourage this Court from closely scrutinizing the within matter. For what Hardwicke possesses in the way of an enormous judgment has been obtained by frequent resort to "litigation from ambush," a technique disfavored by the New Jersey Supreme Court from the date of its inception in 1948.

We believe that once this Court examines the undisputed facts in this case, and recognizes the significant legal issues involved, it will correctly conclude that cer-

tification should be granted. If ever a case of importance cried out for final appellate review, it is this one.

Respectfully submitted,

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WBM/TLA/WJP:jrn